

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

ENDO PAINTING SERVICE, INC.

Respondent,

Case 20-CA-080565

and

INTERNATIONAL UNION OF PAINTERS  
AND ALLIED TRADE, PAINTERS UNION  
1791

Charging Party.

COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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## I. STATEMENT OF THE CASE

This case is before the Administrative Law Judge<sup>1</sup> upon Acting General Counsel's Complaint, alleging that Endo Panting Service (Respondent) violated Section 8(a)(5) of the National Labor Relations Act (the Act) by failing to furnish the Charging Party International Union of Painters and Allied Trades, Painters Local Union 1791 (Union) with requested information necessary for, and relevant to, the Union's performance as exclusive collective-bargaining representative of Respondent's employees.

The facts are almost entirely undisputed. On April 24, 2012, the Union requested specific information from Respondent in order to investigate a grievance affecting bargaining unit employees. Respondent declared on May 4, 2012, that the Union's request for information was not appropriate and lacked authority. The Union again submitted the request on May 22, 2012. It is undisputed that Respondent failed to seek an explanation or clarification of the Union's request for information until July 20, 2012 – nearly three months after the initial request. Respondent's July 20<sup>th</sup> response offered only incomplete and partial compliance with the Union's request for information. It is undisputed Respondent has failed to provide any information the Union requested.

The Board has long held that an employer, as part of its duty to bargain, must provide information that is potentially relevant and of use to the union in fulfilling its duties as representative of employees, which includes the processing of grievances and

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<sup>1</sup> Hereafter referred to as the ALJ or the Judge. Counsel for the Acting General Counsel will be referred to as the "GC." All references to the transcript are noted by "Tr." followed by the page number(s). All references to the General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number(s). All references to the Union's exhibits are noted as "Union Exh." followed by the exhibit number(s). All references to Respondent's exhibits are noted as "Resp. Exh." followed by the exhibit number(s). All references to Joint exhibits are noted as "Joint Exh." followed by the exhibit number(s). All references to Stipulations are noted as "Stip." followed by the paragraph number(s).

policing of the contract. It is undisputed that the Union made a request for information from Respondent and that Respondent refused the Union's request. Simply put, Respondent's refusal to provide the Union with the requested information is unlawful.

## **II. FACTS**

### **A. The Union is the Recognized Collective-bargaining Representative of Respondent's Employees**

Respondent is engaged in the business of painting and decorating. (Joint Exh. 1, Stip. 4; Tr. 129). Respondent operates offices on O`ahu, Maui and the Big Island. (Tr. 129). Respondent President is Gregory Shuji Endo (Endo). (Joint Exh. 1, Stip. 7; Tr. 128). Respondent's O`ahu office is run by Operations Vice-President/Operations Manager Ivan Yamasaki (Yamasaki). (Tr. 128). Respondent's Maui office processes the payroll for the O`ahu office. (Tr. 131).

Respondent is an employer-member of the Painting and Decorating Contractors Association of Hawaii (Association). (Joint Exh. 1, Stip. 9(b); Tr. 133-134). Respondent recognized the Union as the exclusive bargaining representative of Respondent's employees (Joint Exh. 1, Stip. 9(c)). The Association and the Union entered into a Labor Agreement, effective February 1, 2008 to January 31, 2013. (Joint Exh. 1, Stip. 9(c); Joint Exh. 6). There are 40 to 41 employers who are signatories to the Labor Agreement, including Respondent. (Tr. 26-27; Joint Exh. 6).

Mitchell Shimabukuro (Shimabukuro) is the Union's business manager. (Tr. 24) Since 2010 Shimabukuro has been the sole Union representative responsible for filing grievances on the Union's behalf. (Tr. 24).

**B. The Union Filed a Grievance Based on its Belief that Respondent was Violating the Labor Agreement.**

On March 8, 2012, Shimabukuro filed class grievance MS-12-001 with Respondent alleging Respondent had violated numerous provisions of the Labor Agreement. (Joint Exh. 1, Stip. 10(a); Joint Exh. 7; Tr. 28). The Union alleged that Respondent violated Sections 10.B and 14.B of the Labor Agreement by failing to pay overtime to unit employees (Joint Exh. 1, Stip. 10(c); Joint Exh. 7); that Respondent violated Sections 13 and 31.C of the Labor Agreement by changing unit employees' timesheets to reflect a lower amount of hours worked resulting in a failure of the Respondent to comply with wages, classifications and contributions to various funds as outlined in the Labor Agreement (Joint Exh. 1, Stip. 10(d); Joint Exh. 7); that Respondent failed to provide unit employees with a statement of earnings and deductions in violation of Section 14.B of the Labor Agreement (Joint Exh. 1, Stip. 10(e); Joint Exh. 7); that Respondent required unit employees to use their personal vehicles to transport workers and materials in violation of Section 15.N of the Labor Agreement (Joint Exh. 1, Stip. 10(f); Joint Exh. 7); and that Respondent made unilateral changes to the terms and conditions of employment of unit employees in violation of Section 3 of the Labor Agreement. (Joint Exh. 1, Stip. 10(b); Joint Exh. 7).

The Union had previously filed a similar grievance with Respondent. On March 23, 2011, Shimabukuro filed class grievance MS-11-001 alleging a violation of Section 14 of the Labor Agreement. (GC Exh. 2). The Union alleged that Respondent compensated employees in cash in violation of Section 14 of the Labor Agreement. (GC Exh. 2).

During a Joint Industry Committee<sup>2</sup> hearing regarding class grievance MS-11-001, Endo admitted that Respondent made cash payments to employees “on occasion.” (Tr. 143, 186). On April 29, 2011, the Joint Industry Committee unanimously upheld and sustained class grievance MS-11-001 and found, among other findings, that Respondent violated the Labor Agreement by “paying employees in cash without making appropriate payments for trust fund contributions.” (GC Exh. 2).

Shimabukuro testified that he had received reports from four individual employees alleging that the Respondent was once again violating the Labor Agreement. (Tr. 67-68). Consequently, Shimabukuro filed class grievance MS-12-001 on March 8, 2012. (Tr. 28).

**C. On April 24, 2012, the Union Requested Information in Order to Investigate the Grievance.**

On April 24, 2012, Shimabukuro sent Respondent’s President Endo an information request by mail in order to investigate class grievance MS-12-001. (Joint Exh. 1, Stip 15; Joint Exh. 12; Tr. 45, 146). The Union requested certain information dating back to January 1, 2010 to determine whether Respondent was paying employees in cash, changing time sheets, failing to pay overtime pay, and failing to make contributions to the various trust funds. (Joint Exh. 12). The Union requested basic information regarding Respondent’s employees, including the names, addresses, job classifications, dates employed and pay rates for bargaining unit employees (Joint Exh. 12); the Haw. Rev. Stat. § 387-6 (c) notice for each bargaining unit employee for the period dating back to January 1, 2010 (Joint Exh. 12); the daily time sheets, extra hours

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<sup>2</sup> Under the grievance process of the Labor Agreement, the Joint Industry Committee (composed of representatives of the Union and Association employers) is tasked with making final and binding determinations of alleged violations and interpretations of the Labor Agreement. (Tr. 12; Joint Exh. 6).

sheet, weekly detail report, work log daily report and weekly project recap for bargaining unit employees for the period dating back to January 1, 2010 (Joint Exh. 12); asked Respondent to identify and provide certain information regarding employees who were paid cash for the period dating back to January 1, 2010 (Joint Exh. 12); and to name and provide certain information regarding employees who were requested to bank hours worked over 40 hours per week in lieu of overtime pay. (Joint Exh. 12).

To determine whether Respondent was requiring bargaining unit employees to use their personal vehicles to transport workers and equipment in violation of Section 15.N of the Labor Agreement, the Union requested information regarding Respondent's vehicles and the identity of employees authorized to use Respondent's credit cards at local gas stations. (Joint Exh. 12).

The Union also requested information regarding Respondent's organization chart and asked Respondent to identify those employees, representatives or agents who prepared the response to the Union's April 24 request for information. (Joint Exh. 12).

On May 4, 2012, Respondent, by letter through its attorney, wrote to the Union attorney regarding the April 24 request for information. Respondent deemed the Union's April 24 request for information as "not appropriate." (Joint Exh. 1, Stip. 16; Joint Exh. 13). Respondent stated that Shimabukuro "failed to cite any authority requiring [Respondent] to provide the information [Shimabukuro] request[s]." (Joint Exh. 13). On May 22, 2012, Shimabukuro wrote to Endo reiterating the April 24 request for information. (Joint Exh. 1, Stip. 17; Joint Exh. 14). With his May 22 letter, Shimabukuro presented Endo with the signed written complaints of four bargaining unit employees of Respondent underlying grievance MS-12-001.

**D. Respondent Failed to Respond to the Union's Information Request for Nearly Three Months.**

Respondent failed to respond to the Union's request for information until July 20, 2012 – nearly three months after the Union's initial request. (Joint Exh. 1, Stip. 19; Joint Exh. 15; Tr. 105). When Respondent's attorney finally wrote a response to the Union's attorney on July 20, the letter did not offer any explanation for the delay in responding. (Joint Exh. 15). For the first time Respondent attempted to assert relevancy arguments, despite the fact that most of the information requested concerned bargaining unit employees and Respondent only agreed to limited compliance with the April 24 request for information. (Joint Exh. 15). Respondent proposed providing information only relating to the four employees who had provided the Union with signed written complaints and only for a seven-day period immediately preceding the date each grievant signed their respective written complaints. (Joint Exh. 15).

In the same letter, Respondent also offered to provide the name, dates of employment, hourly rate of pay, overtime rate of pay, project sites assigned, paycheck information (including name of employee, address of employee, total hours worked, overtime hours, straight-time compensation, overtime compensation, other compensation, total gross compensation, amount and purpose of deductions, total net compensation, date of payment, and pay period covered), daily time sheet or card, and extra hours sheet only for the four employees who provided signed written complaints and only for the seven days preceding the date of the signed complaints. (Joint Exh. 15). Respondent denied that the four employees were paid cash for work or were requested to bank hours. (Joint Exh. 15). Respondent denied that the four employees were allowed to use Respondent's

credit card for gas. (Joint Exh. 15). Respondent, for the first time, denied that it had an organizational chart. (Joint Exh. 15).

In the July 20 letter, Respondent denied the relevancy and appropriateness of all other information requested. (Joint Exh. 15). Respondent invited explanation if the Union disagreed with Respondent's determination of relevancy or appropriateness. (Joint Exh. 15). Respondent predicated its offer of partial compliance on the Union certifying that the signed-written complaints were the only signed-written complaints the Union had received or that the Union provide to Respondent any other signed-written complaints underlying MS-12-001. (Joint Exh. 15).

### **III. LEGAL ANALYSIS**

The basic facts in this case are undisputed. There is no dispute the Union made an information request on April 24, 2012. (Tr. 44, 146). There is no dispute about the contents of that information request. (Joint Exh. 15). It is undisputed that Respondent failed to provide any information or seek the relevancy of the information requested prior to July 20. (Tr. 64-65). It is undisputed that Respondent's July 20 letter only provided a complete response to one item that the Union requested – denying that Respondent has an organizational chart. (Joint Exh. 1, Stip. 19, 24; Tr. 64-65). It is undisputed that other than the response to the Union's request for Respondent's organizational chart, Respondent failed to provide the Union with any other information responsive to the April 24 request for information. (Tr. 65).

**A. Respondent Has a Duty to Provide Requested Information that is Potentially Relevant to and Useful to the Union as Bargaining Representative**

Under Section 8(a)(5) of the Act, which imposes the duty to bargain in good faith, a unionized employer must provide, on request, information that is relevant and necessary to the union's performance of its duties as collective-bargaining representative, which includes the processing of grievances and policing of the contract. *IronTiger Logistics, Inc.*, 359 NLRB No. 13, slip op. at 2 (2012), citing *Acme Industrial Co.*, 385 U.S. 432 (1967). It is undisputed that the Union is the recognized bargaining representative of Respondent's employees. As Shimabukuro's April 24 letter states, the Union filed the April 24 information request in order to investigate and process the class grievance filed on March 8. (Joint Exh. 12). A union can make an information request in order to determine whether or not to file a grievance or to further process a grievance. *Island Creek Coal Co.*, 292 NLRB 480 (1989), citing *Ohio Power Co.*, 216 NLRB 987 (1975). Moreover, an employer's duty to bargain regarding information requests exists even where no grievance procedure is in place. *Wackenhut Corp.*, 345 NLRB 850 (2005). An employer's duty to provide requested information exists in a variety of situations where the information would be useful to the union in discharging its responsibilities as representative, such as monitoring compliance with the collective-bargaining agreement (*Washington Beef, Inc.*, 328 NLRB 612, 617-618 (1999)); enforcing provisions of the collective-bargaining agreement (*In Re Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001)); and evaluating claims made during negotiations (*Nat'l Labor Relations Bd. v. Truitt Mfg. Co.*, 351 U.S. 149, 76 S. Ct. 753, 100 L. Ed. 1027 (1956)).

When determining the relevance of requested information, the Board uses a broad discovery-type standard, wherein the union's burden requires only a showing of probability that the desired information is relevant and that it would be of use to the union in carrying out its duties. *Certco Distribution Centers & Teamsters Local Union No.695, Affiliated with the Int'l Bhd. of Teamsters*, 346 NLRB 1214, 1215 (2006). The union is not required to show that the facts it relied upon to support its requests are accurate and reliable, and they may reasonably be based on hearsay. *Pub. Serv. Elec. & Gas Co.*, 323 NLRB 1182 (1997), citing *Magnet Coal, Inc. & Dist. 17, United Mine Workers of Am.*, 307 NLRB 444 n.3 (1992). The merits of the grievance underlying the information request are not considered in determining relevance. *In Re U.S.P.S.*, 337 NLRB 820, 822 (2002).

**B. The Union Requested Presumptively Relevant Information Which Respondent Had a Duty to Provide**

Requested information pertaining to bargaining unit employees is presumptively relevant, and the requester does not need to provide an initial showing of relevance. *In Re Int'l Protective Services, Inc.*, 339 NLRB 701 (2003) and *Hofstra Univ.*, 324 NLRB 557 (1997). Rather, the burden to justify a failure to produce presumptively relevant information is on the non-requester, who must rebut the presumption of relevance. *In Re Contract Carriers Corp.*, 339 NLRB 851, 858 (2003). The presumption of relevance is not rebutted by a showing that the union also seeks the information for purposes unrelated to its representative function. *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

The April 24 information request concerns bargaining unit employees. Items 1, 2, 3, 5, 6, and 8 of the April 24 letter specifically request information pertaining to

Respondent's bargaining unit employees.<sup>3</sup> (Joint Exh. 12). Respondent bears the burden of justifying its failure to produce presumptively relevant information. Respondent has been unable to rebut this presumption and has not met its burden to justify its failure to provide presumptively relevant information.

**C. The Union Also Requested Potentially Relevant Information Which Respondent Had a Duty to Produce**

Items 4 and 9 of the Union's April 24 request for information ask Respondent to identify the individuals who prepared the response to the request for information. Item 7 requests information regarding Respondent's motor vehicles.<sup>4</sup> Item 10 concerns Respondent's organizational chart. Information about non-unit employees is considered non-presumptively relevant information. The requester may be entitled to that information after providing an initial showing of relevance. *The Earthgrains Company*, 349 NLRB 389 (2007). This does not mean that a union seeking information about non-bargaining unit individuals has an inordinately high burden for establishing relevance. The Board has held that this burden can be met where a union has demonstrated the "probability that the desired information is relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Frito-Lay, Inc.*, 333 NLRB 1296 (2001).

With respect to the information requested for non-unit employees, Shimabukuro's testimony demonstrated that the information is relevant and useful to the Union in carrying out its statutory duties and responsibilities. Shimabukuro testified that item 4 is

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<sup>3</sup> The Complaint does not alleged the failure of Respondent to produce item 8, subparagraph c of the Union's April 24 request for information. (Joint Exh. 16).

<sup>4</sup> The Complaint does not alleged the failure of Respondent to produce item 7, subparagraph c of the Union's April 24 request for information. (Joint Exh. 16)

necessary to correlate the foreman on the jobsites with the workers on the jobsites and the hours worked and employee pay rates. (Tr. 62). Shimabukuro testified that information requested in item 9 is necessary for the Union to verify the accuracy of hours and jobsites reported in response to the information request. (Tr. 63).

Shimabukuro testified that the information requested in item 7 directly related to the allegation in grievance MS-12-001 that Respondent had forced employees to use their personal vehicles to transport workers and equipment in violation of Section 15.N of Labor Agreement. (Tr. 62-63). Shimabukuro testified that the Union had received complaints from employees that Respondent had forced employees to use their personal vehicles in violation of the Labor Agreement. (Tr. 62-63). Section 15.N. of the Labor Agreement prohibits Respondent from requiring its employees to use their personal vehicles to transport workers or materials. (Joint Exh. 6). Shimabukuro testified that the information regarding Respondent's motor vehicles was necessary to establish whether Respondent had violated the Labor Agreement based on the number of jobsites and whether Respondent had sufficient motor vehicles to transport its employees to service the various jobsites. (Tr. 63).

Shimabukuro testified that the information requested in item 10 was necessary to identify Respondent's supervisors to verify the validity of the records Respondent would provide in response to the April 24 information request. (Tr. 64). The Union alleged in the underlying grievance that Respondent "changed times sheets to show less hours worked" in violation of the Labor Agreement. (Joint Exh. 7). Shimabukuro testified that the Union needed the information in item 10 "to see if whatever documents that come (sic) up is accurate." (Tr. 64).

Even if Respondent initially did not know the relevance of this non-unit information at it could have responded timely to these particular requests by asking that the Union demonstrate the relevance of those items. However, Respondent did not do this and chose to ignore the request until July 20, 2012.

**D. Respondent's Failure to Timely Respond to the Request is a Violation Section 8(a)(5) and (1)**

Where an information request is not specifically limited to bargaining unit employees and could encompass non-unit employees as well, the employer is not excused from responding. *In Re Streicher Mobile Fueling, Inc.*, 340 NLRB 994 (2003). Board law is clear that "an employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification or comply with the request to the extent that it encompasses necessary and relevant information." *Superior Prot. Inc. & United Gov't Sec. Officers of America* local 229, 341 NLRB 267, 269 (2004), *enfd. N.L.R.B. v. Superior Prot., Inc.*, 401 F.3d 282 (5th Cir. 2005) and *Gruma Corp.*, 345 NLRB 788 (2005). See also *Keauhou Beach Hotel*, 298 NLRB 702 (1990). As the Board in *Columbia University*, makes clear, "an employer must respond to a union's request for relevant information within a reasonable time, either by complying with it or by stating its reason for noncompliance within a reasonable period of time. Failure to make either response in a reasonable time is, by itself, a violation of Section 8(a)(5) and (1) of the Act. Some kind of response or reaction is mandatory." 298 NLRB 941, 945 (1990), citing *Ellsworth Sheet Metal, Inc.*, 232 NLRB 109 (1977).<sup>5</sup> Even when an employer may have a justification for not actually providing requested information, a timely response is required. *IronTiger Logistics, Inc.*, 359 NLRB No. 13, slip op. at 2.

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<sup>5</sup> See also *Nw. Graphics, Inc. & Local 505-m, Graphic Communications Int'l Union, Afl-Cio*, 342 NLRB 1288 (2004) (delay is as much of a violation of Section 8(a)(5) as not giving information at all).

It is undisputed that the Union made an information request on April 24, 2012, that Respondent, on May 4, denied the Union's request for information, and the Union, on May 22, renewed the April 24 request for information. Respondent's May 4 denial failed to seek a clarification of the information requested. Respondent simply denied the Union's request as not appropriate and denied the Union's right to seek such information. Respondent failed to respond at all to the Union's May 22 renewal of the April 24 request for information until July 20, 2012. Respondent's July 20 response offered only limited compliance with the April 24 request for information; limited to four employees and for only a seven-day period. Respondent's July 20 response offered a complete response to only one item of information the Union requested, informing the Union that Respondent did not have an organizational chart.

*In Re Summa Health Sys., Inc.*, 330 NLRB 1379 (2000), the Board found there was an unlawful delay of two months in responding to a request for information related to whether bargaining unit work was being performed by non-unit employees. The Board found that the two-month delay prevented the Union from determining the merit of their concern.

In *IronTiger Logistics*, the Board found an unlawful delay even where the requested information was ultimately held to be irrelevant to the underlying grievance. 359 NLRB No. 13, slip op. at 2. The Board found that even where a request is made for information that is ultimately found to be irrelevant, the employer must respond in a reasonably timely manner. *Id.* The Board reasoned that the "minimal burden" is placed on the employer because the employer is in a "clearly superior position to ensure that a

dispute is avoided” and to “discourage burden[ing] the parties and the public with the cost of administrative investigation and litigation.” *Id.* at slip op. 3.

Respondent failed to respond to the Union’s May 22 request for information for nearly two months. During the two month delay, Respondent failed to seek a clarification of the request or explain to the Union its reasons for refusing to comply with the Union’s request for information. By choosing to ignore the request for two months and then only providing an offer of very narrow and limited compliance with the request and providing only a complete response to one item requested, Respondent has violated Section 8(a)(5) and (1) of the Act.

#### **E. Respondent’s Defenses Should Be Rejected**

Respondent’s Third Amended Answer asserts 11 affirmative defenses to the Complaint. (Resp. Exh. 2). Counsel for the Acting General Counsel has attempted to summarize and respond to Respondent’s alleged defenses. In its Third Amended Answer to the Complaint and during the hearing, Respondent argued that the Complaint allegations lack merit because: the Union lacked the authority to file class grievances; the Board lacked jurisdiction; production of the information requested was burdensome and made to harass Respondent; and the grievance underlying the information request is without merit. Finally, all of these arguments lack merit and should be rejected.

##### **1. Respondent presented no evidence of the parties agreeing to limit the filing of class grievances.**

Respondent argued that the Union lacked authority to file a class grievance. (Joint Exh. 13; Resp. Exh. 2). This argument flies in the face of the Board’s decision in *D.R. Horton* where it found that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are

exercising rights protected by Section 7 of the [Act].” 357 NLRB No. 184, slip op. at 3 (2012). Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7. 29 U.S.C. §158(a)(1).

The Labor Agreement is silent as to class grievances, but its silence cannot be construed as a waiver. A waiver of a statutory right can occur in one of three ways: by express provision in the collective-bargaining agreement, by the conduct of the parties (including past practices), or by a combination of the two. *Chesapeake & Potomac Tel. Co. v. N.L.R.B.*, 687 F.2d 633, 636 (2d Cir. 1982). A union’s waiver of a statutory right must be “clear and unmistakable.” *Allison Corp.*, 330 NLRB 1363, 1365 (2000) citing *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983).

The Board in *Georgia Power Co.* found that “[e]ven when an employer relies on contract provisions in an attempt to show that a union has waived its right to bargain over an issue, either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter.” 325 NLRB 420, 420-421 (1998). Respondent argues that nothing in the Labor Agreement authorized the Union to file class grievances. (Joint Exh. 13; Resp. Exh. 2). However, the record is clear there is nothing in the Labor Agreement that explicitly limits the filing of class grievances. (Joint Exh. 6; Tr. 43-44, 233). Respondent failed to produce any evidence that the Union expressly waived the right to file class grievances in any

provision of the Labor Agreement. Further, Respondent failed to produce any evidence of any clear and unmistakable waiver of the right to file class grievances.

Also undermining Respondent's argument is the Respondent's past practice of acknowledging class grievances. The Union filed several class grievances against Respondent and other employers subject to the Labor Agreement, and neither Respondent, or any other employer subject to the Labor Agreement, have raised an objection to the filing of class grievances. (Tr. 30-31, 35, 36, 38). The record is clear that the Joint Industry Committee has sustained and upheld several class action grievances filed by the Union against Respondent and other employers subject to the Labor Agreement. (Tr. 39; GC Exh. 2, 3, 4).

On March 23 and March 24, 2011 Shimabukuro filed two class grievances against Respondent regarding alleged violations of the Labor Agreement. (GC Exh. 2, GC Exh. 3; Tr. 34, 108). A Joint Industry Committee hearing was held regarding these two grievances on April 28, 2011, and Respondent did not raise any issue or objection to the Union filing the class grievances. (GC Exh. 2; Tr. 35). On April 29, 2011, the Joint Industry Committee upheld and sustained the Union's March 23 and March 24 class grievances against Respondent. (GC Exh. 2).

On May 2, 2011, Shimabukuro filed a class grievance against Respondent and JD Painting & Decorating, Inc. (JD Painting), an Association member-employer, regarding alleged violations of the Labor Agreement. (GC Exh. 4; Tr. 38). On May 5, 2011 Shimabukuro filed a class grievance against A & J Painting, an Association member-employer, regarding alleged violations of the Labor Agreement. (GC Exh. 5; Tr. 38). A Joint Industry Committee hearing was held regarding these class grievance on June 1,

2011, and neither Respondent nor any other employer-member raised the issue or objection to the Union filing a class grievances. (GC Exh. 4, GC Exh. 5; Tr. 38). On June 9, 2011, the Joint Industry Committee upheld and sustained the Union's May 2 and May 5 class grievances. (GC Exh. 4, GC Exh. 5).<sup>6</sup>

On August 13, 2012, Shimabukuro filed a class grievance against Akira Yamamoto Painting (Akira), an Association member-employer, regarding alleged violations of the Labor Agreement. (GC Exh. 6; Tr. 38). A Joint Industry Committee hearing was held regarding the grievance on August 29, 2012, and Akira did not raise any issue or objection to the Union filing a class grievance. (GC Exh. 6; Tr. 38). On June 9, 2011, the Joint Industry Committee upheld and sustained the Union's August 13 class grievance against Akira. (GC Exh. 6).

In these circumstances, it is clear that not only Respondent, but the other employers who are signatories to the Labor Agreement, acknowledge the Union's right to file class grievances. Furthermore, the Joint Industry Committee has acknowledged the right of the Union to file class grievances under the Labor Agreement when it sustained multiple class grievances presented before it. Respondent presented no evidence of a waiver of the Union's right to file class grievances.

## **2. The Board has jurisdiction over this matter.**

Respondent relies on *Square D Co. v. N. L. R. B.*, 332 F.2d 360 (9th Cir. 1964) for its defense that the Board lacks jurisdiction over the dispute between Respondent and the Union. (Resp. Exh. 2). In *Square D*, a dispute arose between the union and the employer regarding the construction of the collective-bargaining agreement and an incentive plan

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<sup>6</sup> The Joint Industry Committee upheld and sustained in part the May 5 class grievance against A & J Painting. (GC Exh. 5).

that was not contained in current and past collective-bargaining agreements between the parties. 332 F.2d at 361. The Ninth Circuit found the dispute concerned the construction of the contract and that the union was not entitled to the information requested until an arbitrator had decided the issue of whether the union by contract had waived its right to grieve respecting the group incentive plan. *Id.* at 366. The matter before the ALJ in this case is not one of the construction of the Labor Agreement. There is no dispute that the subject matter of grievance MS-12-001 involves potential violations of the Labor Agreement. The potential violations of the Labor Agreement however, do not involve an interpretation of the Labor Agreement and Respondent has provided no evidence that grievance MS-12-001 relates to an interpretation of the Labor Agreement.

Respondent, in its Third Amended Answer, agrees that the Union may be entitled to the information requested if it relates to the grievance process. But, Respondent then claims that the present dispute is “not a case where the information requested by the Union is required in order to commence, process, or complete the grievance procedure.” (Resp. Exh. 2). Despite Respondent’s statement, Respondent admits in its July 20 letter that the Union requested the information “for the purpose of enabling the Union ‘to properly investigate and process the class action grievance.’” (Joint Exh. 15). Most importantly, the record is clear that the Union sought the information requested to investigate and process the class action grievance filed on March 8, 2012.

Respondent also relies on *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960) to support its claim that the Board lacks jurisdiction over the dispute between the Union and Respondent. (Resp. Exh. 2). Respondent’s reliance on *United Steelworkers* is again misplaced. In *United Steelworkers*, the union sought to compel

arbitration over a dispute about whether the employer violated the parties' collective-bargaining agreement where the collective-bargaining agreement included an arbitration clause encompassing all grievances. 363 U.S. at 564-65. The underlying grievance between Respondent and the Union, like *United Steelworkers*, concerns a dispute regarding the application of the collective-bargaining agreement. 363 U.S. at 569. The instant Complaint, however, does not seek to resolve Respondent's alleged violations of the Labor Agreement underlying the information request. Unlike the *United Steelworkers*, the dispute presently before the ALJ concerns Respondent's alleged violation of the Section 8(a)(5) and 8(a)(1) of the Act.<sup>7</sup> The Board maintains jurisdiction to resolve violations of the Act.

Respondent further relies on *Burns Int'l Sec. Services v. N.L.R.B.*, 146 F.3d 873 (D.C. Cir. 1998) to support its claim that the Board lacks jurisdiction over this dispute. (Resp. Exh. 2). Respondent's reliance on *Burns Internat'l* is once again misplaced. In *Burns Internat'l* the union filed a refusal to bargain charge with the NLRB regarding an alleged unilateral change to holiday pay. *Id.* at 874. The employer defended against the charge claiming its actions were authorized by the collective-bargaining agreement. The Court found that where a collective-bargaining agreement provides for arbitration as the method of resolving disputes over the meaning of the agreement, the Board is required to defer to arbitration. *Id.* at 877. Respondent's reliance on *Burns Internat'l* ignores well-established Board law that Section "8(a)(5) complaint allegations concerning failure to provide requested information are not appropriate for deferral." *Daimlerchrysler Corp. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (Uaw)*,

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<sup>7</sup> *United Steelworkers* did not address the issue of the Court's jurisdiction regarding an information request stemming from a grievance conducted under the grievance process of a collective-bargaining agreement.

*Local 412, (Unit 53), Afl-Cio*, 344 NLRB 1324 (2005) citing *U.S. Postal Serv. & Am. Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, Afl-Cio*, 302 NLRB 767 (1991).

In its Third Amended Answer, Respondent appears to argue that the Labor Agreement does not require Respondent to produce information. (Resp. Exh. 2). No provision of the Labor Agreement directly addresses the parties' obligation to produce information. It is well established that the Board maintains jurisdiction over violations of Section 8(A)(5) of the Act such as Respondent's failure to produce information.

**3. Production of the requested information is not overly burdensome and the Union did not make the request to harass Respondent.**

Respondent argued for the first time at the hearing that the Union's request for information was a "technique for harassment" and a "harassment tactic."<sup>8</sup> (Tr. 20, 81). When asked by the ALJ to identify which parts of the Union's information request are harassment, Respondent argued that "it doesn't appear proper in terms of taking four complaints and then saying we suspect that you violated with respect to everyone in the Company and therefore we're asking for all of your documents so that we can inspect every time card, every weekly or daily time report with respect to each employee. That was our position was improper (sic)." (Tr. 81-82). It appears that Respondent argues that the Union's request for presumptively relevant information is harassment. Respondent offers no justification for the position that a request for presumptively relevant information is harassment.

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<sup>8</sup> Bad faith is an affirmative defense that must be pled and proved by the Respondents. *Island Creek Coal Co.*, 292 NLRB 480, 489 n.14 (1989). The Respondents did not raise the issue of bad faith in their answer to the complaint.

The Board will presume that a union's request for information is made in good faith until the employer can demonstrate otherwise. *Columbia Univ.*, 298 NLRB at 945 citing *O & G Indus.*, 269 NLRB 986, 987 (1984). Under the Board's standard for determining good faith with regard to information requests, the good-faith requirement is met if "at least one reason for the demand can be justified." *Ak Steel Corp.*, 324 NLRB 173, 184 (1997). The mere assertion of harassment is insufficient to overcome the presumption of good faith accorded to the Union. Shimabukuro testified that the Union made the April 24 information request to further investigate class grievance MS-12-001. (Tr. 45). The April 24 information request clearly states that "the information is needed to properly investigate and process the class action grievance." (Joint Exh. 12). The Union has thereby demonstrated it has met the good-faith requirement and that its need for the requested information is justified. *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788 (2001).

Respondent argued that producing the information requested is a "huge, monumental task," (Tr. 90, 91), and that complying with the Union's information request would require Respondent to "go to and gather all of this information" for over 15 jobs. (Tr. 92). However, arguing that the information request is voluminous does not indicate bad faith. *Gruma Corp.*, 345 NLRB at 788. Further, Respondent's failure to raise, at the time of the request, any issue concerning the possible burden of complying with the Union's request undermines its claim of burdensomeness as a defense. *Id.* at 789 citing *Anthony Motor Co., Inc.*, 314 NLRB 443, 450 (1994), citing *Oil, Chem. & Atomic Workers Local Union No. 6-418, AFL-CIO v. N.L.R.B.*, 711 F.2d 348, 353 n.6 (D.C. Cir. 1983) (if a party "does wish to assert that a request for information is too burdensome,

this must be done at the time information is requested, and not for the first time during the unfair labor practice proceeding"). Further, although the Board and courts have held that there are some acceptable limits on information requests that would otherwise entail an undue burden; the onus is on the employer to show that production of the data would be unduly burdensome, and to offer to cooperate with the union in reaching a mutually acceptable accommodation. *Yeshiva Univ.*, 315 NLRB 1245, 1248 (1994).

Despite Respondent's claim that complying with the information request would be a huge task, Respondent's own witnesses cast doubt on this assertion. Endo testified that he did not know how long it would take to produce all the information requested. (Tr. 179). Endo estimated it would take a "long time" to produce the information but clarified that he until he got started, he would not know how long it would take to produce the information. (Tr. 197). Respondent Vice President Yamasaki testified that responding to the Union's request for information would require sorting through two 9' x 3' desks under Respondent's O`ahu office. (Tr. 284-285).

Despite its claim that responding to the information request would be a huge, monumental task, Respondent offered at the ALJ hearing to produce the information requested for four employees going back two years. (Tr. 91, 100). Respondent failed to offer any credible evidence to support its claim that complying with the Union's request for information in its entirety would be overly burdensome, and has not made any effort to reach a mutually acceptable accommodation with the Union.

**4. Merits of the underlying grievance are irrelevant to Respondent's duty to provide information.**

Respondent argues numerous defenses to grievance MS-12-001, the grievance underlying the complaint, that Respondent claims renders the request for information improper.<sup>9</sup> The Board in *Des Moines Cold Storage, Inc.* found that:

“[I]t is well established that an employer is required to provide such information regardless of the potential merits of a grievance. This principle applies **even if the employer has a colorable procedural defense to the grievance.** Consequently, even if the Respondent could maintain a valid timeliness defense against the grievance, it unlawfully refused to provide the requested relevant information.”

358 NLRB No. 58, slip. op. at 2 (2012) (internal citations omitted) (emphasis added). Under established Board law, it is clear that information sought in support of a procedurally deficient grievance is not irrelevant since the Board does not pass on the merits of the union's claim that the employer breached the collective-bargaining agreement. *In Re U.S. Postal Serv.*, 339 NLRB 1162, 1167 (2003) citing *Postal Serv.*, 303 NLRB 502, 509 (1991), citing *Island Creek Coal Co.*, 292 NLRB 480 (1989). See also *Asarco Inc.*, 316 NLRB 636, 643 (1995) (the Board, in determining that information is producible, does not pass on the merits of the grievance underlying a request); *Postal Serv.*, 303 NLRB at 507-08 (1991) (merits of the grievance for arbitrator to decide; Section 8(a)(5) “obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the union in fulfilling its

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<sup>9</sup> Respondent argues in its Third Amended Answer that the Union failed to follow the grievance process as outlined in the Labor Agreement. Respondent's first affirmative defense states that the Union's claims are barred by the Labor Agreement's “seven (7) day statute of limitations.” Respondent's eleventh affirmative defense states that the Union met none of the requirements of the Labor Agreement's grievance procedure. Respondent claims that the Union failed to produce signed written complaints of employee grievants at the time the grievance was filed, the Union delayed in producing the signed written complaints, the four complaints do not constitute valid grievances, and that the subjects of the grievance(s) are limited to a seven day window directly preceding the signing of the written complaints. (Resp. Exh. 2; Joint Exh. 15).

statutory duties as bargaining representative” even where grievance is obviously time barred under the grievance process).

Respondent argued that the Union has failed to prove the existence of a class of workers that have suffered the grievances alleged by the Union in MS-12-001. (Resp. Exh. 2). Respondent relies on *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970) to support its claim that the Union cannot establish the existence of a class. Respondent’s reliance on *Seay* is misplaced. The dispute in *Seay* regarded, among other issues, the certification of a class action in a civil suit filed before the District Court of the Central District of California based on Fed. R. Civ. P. 23.<sup>10</sup> Respondent’s reliance on *Seay* ignores the fact that MS-12-001 is a grievance filed under the grievance process as outlined in the Labor Agreement, not under Fed. R. Civ. P. 23’s requirements to certify a class action in a federal civil suit. Respondent’s reliance on *Seay* ignores established Board law that it is not required that there be a grievance filed before a union is entitled to the information so that a union may “determine whether it should exercise its representative function in the pending matter,” including whether the information will warrant further processing of the grievance or determining whether a violation of the contract occurred. *Island Creek Coal Co.*, 292 NLRB at 487-88. Thus, even under a rationale that the Union failed to follow the grievance process as outlined in the Labor Agreement or failed to produce evidence of a class grievance, the Board should still find that Respondent violated Section 8(a)(5) of the Act by refusing and failing to provide information the Union requested to fulfill its statutory duties as bargaining representative.

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<sup>10</sup> Respondent’s Tenth Affirmative defense in its Third Amended Answer states that the Union fails to meet the requirements of Fed. R. Civ. P. 23 or “NLRB case law required to constitute a class.”

**5. The Joint Industry Committee's previous award does not bar the April 24 request for information.**

Respondent argued that the Union's April 24 request for information was based "upon the fact that [Respondent] has not yet made such production" of information as required in the Joint Industry Committee award in a previous grievance MS-11-001. (Resp. Exh. 2). On April 29, 2011, the Joint Industry Committee unanimously upheld and sustained class grievance MS-11-001 and found, among other findings, that Respondent violated the Labor Agreement by "paying employees in cash without making appropriate payments for trust fund contributions." (GC Exh. 2). The Joint Industry Committee required Respondent to produce the "books and accounts of its payroll of bargaining unit employees from January 1, 2010 to the present [April 29, 2011]" for examination by a independent certified public accountant to calculate the amount of back pay and contributions due to the various trust funds as required in the Labor Agreement. (GC Exh. 2). Respondent argues that the Union's charge against Respondent is improper because the "enforceability" of the Joint Industry Committee decision in MS-11-001 is currently being "litigated in State court." (Resp. Exh. 2).<sup>11</sup>

Board precedent is clear; where a union's request for information is for a proper and legitimate purpose, it cannot make any difference that there may be other reasons for the request or that the data may be put to other uses. *Oil, Chem. & Atomic Workers Local Union No. 6-418, AFL-CIO*, 711 F.2d, 429, 429 (1993); *Associated Gen. Contractors of California*, 242 NLRB 891, 894 (1979). Further, the Board in *Westinghouse Electric Corp.*, rejected the defense that a union's request for information is barred because the

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<sup>11</sup> On June 28, 2012, the Circuit Court of the First Circuit of the State of Hawaii confirmed the April 29, 2011 MS-11-001 Joint Industry Committee award and denied Respondent's Motion to Vacate the Arbitration Decision and Award. (Union Exh. 1).

union sought to use the information to help prosecute a civil suit against the employer. 239 NLRB 106 (1978). In *Westinghouse Electric Corp.*, the Board ordered the employer to furnish the union information concerning a pension fund despite the fact that the union had filed a civil suit seeking an audit of the pension fund. *Id.* at 110–111. The Board found “that if information is relevant to the collective bargaining, it loses neither its relevance nor its availability merely because a union additionally might or intends to use it to attempt to enforce statutory and contractual rights before an arbitrator, the Board or a court.” *Id.* Board precedent is clear that the Union’s April 24 request for information is not barred by current litigation between the Union and Respondent.<sup>12</sup>

#### **6. Respondent’s remaining defenses also fail.**

Respondent presented no evidence to support affirmative defenses two through nine in its Third Amended Answer and these defenses should clearly be rejected.<sup>13</sup> (Resp. Exh. 2). Respondent presented no evidence or made any arguments to support its claim that its “books and records” are “confidential and proprietary.” (Resp. Exh. 2). Finally, Respondent presented no evidence or made any arguments to support its claim that being “required to submit” to the Union’s request for information “could have an adverse impact on [Respondent’s] business,” and this spurious defense should be rejected.

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<sup>12</sup> Should the ALJ hold that the Union, through this Complaint, is not entitled to the information in the Joint Industry Committee award in MS-11-001, the Union’s April 24 request for information is not moot. The April 24 request for information encompasses information not contemplated in MS-11-001 and Counsel for the Acting General Counsel requests, in the alternative, an order requiring Respondent to produce such overlapping information from April 30, 2011 to the present. *See supra* Section II.B.

<sup>13</sup> These incongruous “defenses” included a request for attorney’s fees and punitive damages, claims that the Union failed to exhaust administrative remedies, failed to mitigate damages, has unclean hands, and that Respondent acted in good faith.

#### IV. CONCLUSION

It is undisputed that the Union filed an information request on April 22 and reiterated that request on May 22, 2012 pursuant to Respondent's alleged violation of the Labor Agreement. It is undisputed that Respondent failed to respond to the Union's request for information until July 20, 2012. It is undisputed that Respondent has only produced a complete response to only one item that the Union requested and Respondent has failed to produce any other information the Union requested. Respondent has failed to produce any credible evidence that would excuse its duty to respond to the Union's information request or to produce the information requested. Respondent's delay and refusal to provide information clearly violates Section 8(a)(5) and (1) of the Act. Counsel for the Acting General Counsel respectfully urges the Judge to find that Respondent violated the Act as alleged and that Respondent be ordered to cease and desist from engaging in such conduct. The undersigned also requests the Judge order the posting of a notice and that the Judge provide any other relief deemed appropriate.

DATED AT Honolulu, Hawaii, this 3rd day of December 2012.

Respectfully Submitted,

/s/ Scott E. Hovey, Jr.

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